"... The eighth ground of appeal alleges that the accused's counsel was never given an opportunity of addressing the court at the close of the case. This is admitted by the learned Deputy Public Prosecutor and constitutes a serious irregularity. In view of this there is no necessity to enter into the merits of the conviction. The appeal will be allowed, the conviction set aside and a new trial ordered."

I myself had occasion to deal with this matter in Kuching Criminal Appeal No. K.7/79 where I said: "In this connection, I would like to quote a well-known *dictum* of Lord Hewart in *R.* v. *Sussex Justices, Ex parte McCarthy*(2) that 'it is of fundamental importance that justice should both be done and be manifestly seem to be done'."

The appeal is allowed.

Appeal allowed.

Solicitors: *David Tiong & Michael Tiong.*

SIM BOON CHAI v. PUBLIC PROSECUTOR

[A.Cr.J. (Seah J.) October 20, 1981 & November 7, 1981]

[Kuching — Criminal Appeal No. KG 7 of 1981]

Criminal Law and Procedure — Sentence — No record of antecedents and character of accused — Penalty under regulations — Interpretation Act, 1967, s. 27 — Control of Supplies Regulations, 1974, Reg. 13(1) — Control of Supplies Act, 1961 (Act 122), s. 22.

In this case the appellant had pleaded guilty to the offence of failing to maintain a stock book of a scheduled article, an offence under regulation 13(1) of the Control of Supplies Regulations, 1974. The learned Magistrate noted —

"The accused is convicted on his own plea. Accordingly I fine the accused a sum of $3,000 in default of 3 months imprisonment."

The appellant appealed against the sentence.

Held: (1) although time has not been expressly specified in Regulation 13(1) of the Control of Supplies Regulations, 1974, this should be read subject to section 37 of the Interpretation Act, 1967 and entries in the stock book are to be made from time to time as occasions require them. As the appellant had totally failed to record the purchases of sugar in the stock book during the months of October and November 1980 he was plainly guilty of contravening Regulation 13(1) of the Regulations;

(2) although the Regulations are silent as to penalties, the penalties are provided in section 22 of the Control of Supplies Act, 1961 and having regard to the express provision of section 22 of the Act, section 27 of the Interpretation Act, 1967 is irrelevant in considering the sentence to be passed on the appellant by the trial Magistrate;

(3) the trial Magistrate in this case did not record any evidence of the antecedents and character of the accused before proceeding to sentence. The fine of $3,000 was manifestly wrong in the sense of being unsuitable to the proved facts and circumstances of the case and should be set aside and a fine of $2,000 or in default 2 months' imprisonment be substituted.

Cases referred to:-

(1) *Abu Bakar bin Alif* v. *R.* [1953] M.L.J. 19.

(2) *R.* v. *Ball* 35 C.A.R. 164.

(3) *Public Prosecutor* v. *Fam Kim Hock* [1957] M.L.J. 20.

CRIMINAL APPEAL.

Chan Khoon Ted for the appellant.

Nik Hashim bin Nik Abdul Rahman, Deputy Public Prosecutor (*Abang Abdul Rahaman bin Datuk Haji Abdul Rahim,* Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Seah J.: On December 12, 1980 at about 9.45 a.m., a party of Enforcement Officers from the Ministry of Trade and Industry, Kuching, Sarawak, made a surprise check on the appellant, who has been issued with a wholesaler licence by the Controller of Supplies, Kuala Lumpur to deal in 3 scheduled articles such as flour, sugar and cooking oil, and who carries on business under the trade name of Tai Seng Company at No. 95, Ang Cheng Ho Road, Kuching, Sarawak. The officers found that the appellant had failed to maintain a stock book of scheduled article where there should be entered particulars and every purchase of the said scheduled article showing the date, quantity, price, name and address of the seller in respect of these purchases. The appellant was accordingly charged under Regulation 13(1) of the Control of Supplies Regulations, 1974. He pleaded guilty to the charge and was convicted and fined $3,000 or in default 3 months' imprisonment.

The appellant, Sim Boon Chai, is dissatisfied with the fine and this appeal is against sentence only.

Before dealing with the appeal I would like to set out the relevant facts. It is common ground that when the Enforcement Officers from the Ministry of Trade and Industry visited the appellant's premises, they were handed a stock book relating to sugar which appears to have been made up to September 10, 1980. At the same time, the Enforcement Officers discovered that the appellant had made 6 purchases of sugar from Lian Hua Seng Co., Sdn. Bhd., particulars of which are as follows:

(i) Invoice 64286	—	3.10.80	—	$ 6,720.00
(ii) Invoice 64465	—	11.10.80	—	$ 672.00
(iii) Invoice 64662	—	25.10.80	—	$ 3,375.00
(iv) Invoice 64851	—	14.11.80	—	$ 6,750.00
(v) Invoice 64886	—	15.11.80	—	$ 6,750.00
(vi) Invoice 64937	—	18.11.80	—	$13,500.00 — $37,767.00

It appears that the appellant had made 3 payments totalling $50,967.00 on these dates and in respect of all of the above-named invoices, viz:

(a) Receipt 24992	—	14.11.80	—	$20,592 (Invoices 64465, 64286 and 63874)
(b) Receipt 25037	—	20.11.80	—	$ 3,375 (Invoice 64662)
(c) Receipt 25154	—	9.12.80	—	$27.000 (Invoices 64851, 64886 and 64937).

It is plain that these transactions spread over a period of slightly over 2 months from October 3, 1980 to December 9, 1980, and it is not disputed that the appellant had not entered these purchases in his stock book (Ex. P2).

Now, Regulation 13(1) reads:

"A wholesaler shall maintain a stock book of every scheduled article to which his licence relates in which there shall be entered particulars of every purchase or sale by him of the scheduled article showing the date, quantity, price, and the name and address of the seller or purchaser, as the case may be, in respect of such purchase or sale."

Counsel for the appellant has rightly pointed out that unlike Regulation 13(3), a wholesaler need not have to maintain a *daily* record and he argued that since no time has been stated when the entries are to be made, it follows that the entries need not have to be made up-to-date. It seems to me that counsel for the appellant has overlooked section 37 of the Inter-

pretation Act, 1967 which provides that "where a written law confers any power or imposes any duty, the power may be exercised and the duty shall be performed from time to time as occasion requires". Although time has not been expressly specified in Regulation 13(1) this should be read subject to section 37 of the Interpretation Act, 1967 and in my judgment, entries in the stock book are to be made from time to time as occasions require them. As the purchases of sugar, a scheduled article, were made during the months of October and November 1980 entries in the stock book should have been made by the appellant or his agent on the various dates when the purchases were made or upon receipt of the said invoices if the date of the purchase and the receipt of the invoice happens to differ. As the appellant had totally failed to record these 6 purchases of sugar in the stock book during the months of October and November 1980 he was plainly guilty of Regulation 13(1) of the Control of Supplies Regulations, 1974.

I would now deal with the sentence imposed by the trial Magistrate in the court below.

For the appellant it was submitted that the fine of $3,000 was manifestly excessive and harsh for the following reasons:

(a) that the appellant was a first offender;

(b) that he had pleaded guilty to the charge;

(c) that he did keep a stock book (Ex. P2) albeit he had not maintained it up-to-date in respect of purchases made during the months of October and November 1980;

(d) that the offence complained of was an administrative one and that the public did not suffer any loss or disadvantage financially.

In support of these submissions counsel for the appellant also relies on section 27 of the Interpretation Act, 1967 which provides that "Subsidiary legislation may provide for persons guilty of offences thereunder to be liable on conviction to a fine or a term of imprisonment or both, but may not provide for any such fine to exceed one thousand dollars or any such term to exceed six months".

The Senior Federal Counsel has argued that the provisions of section 27 of the Interpretation Act, 1967 do not apply to this case and that the section should not be used as a yardstick by the trial Magistrate for the purpose of sentence. If the legislature had intended that maximum fine for an offence under Regulation 13(1) of the Control of Supplies Regulations, 1974 should not exceed $1,000 express provision would have been so enacted in the said Regulations. The Regulations are silent as to penalties which can be found in section 22 of the Control of Supplies Act, 1961 (Revised 1973). Subsection 1 of section 22 provides for a maximum sentence of $15,000 or to imprisonment for a term not exceeding 2 years or to both for first offender; and for a second or subsequent offence, the maximum fine to be $25,000 or 5 years' imprisonment or to both. This subsection covers any person, other than a body corporate.

Subsection 3 empowers the trial court either to cancel or to suspend a licence issued under section 7 thereof in appropriate cases.

Senior Federal Counsel also drew the attention of the court to the case of *Abu Bakar bin Alif* v. *R.*[1] where Spenser-Wilkinson J. following the principles laid down in *R.* v. *Ball*[2] said:

> "(i) the (appellate) court does not alter a sentence which is the subject of an appeal merely because the members of the court might have passed a different sentence.... It is only when a sentence appears to err in principle that this court will alter it;
>
> (ii) the first and foremost consideration of punishment is the public interest.... Our law does not therefore, fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that evidence of antecedents and character should be taken before sentence in respect of each convicted person."

In the case of *Public Prosecutor* v. *Fam Kim Hock*[3] Buhagiar J. said that the sentence of the court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

I agree with the submission of the Senior Federal Counsel that section 27 of the Interpretation Act, 1967 is irrelevant in considering the sentence to be passed on the appellant by the trial Magistrate, having regard to the express provision of section 22 of the Control of Supplies Act, 1961 (Revised 1973).

Now, what happened in the lower court? The notes of proceedings of the trial Magistrate read:

> "The accused in convicted on his own plea. Accordingly I fine the accused a sum of $3,000 in default of 3 months' imprisonment. ex. P2 and P3 to be returned to the accused person."

It is plain that the trial Magistrate did not record any evidence of antecedents and character of the accused before proceeding to pass sentence. In short, the trial Magistrate did not appear to have taken the following relevant factors into consideration:

(a) that the accused was a first offender;

(b) that the accused did maintain a stock book (Ex. P2) but had not kept it up-to-date and that the accused did not know that he had to maintain the stock book up-to-date; and

(c) that the accused had pleaded guilty to the charge.

Applying the principle stated in *Fam Kim Hock's* case, *supra*, I am satisfied that the fine of $3,000 is manifestly wrong in the sense of being unsuitable to the proved facts and circumstances of this case. I therefore set it aside and substitute a fine of $2,000 or in default 2 months' imprisonment. To that extent the appeal is allowed. Before departing from this appeal there is one other matter I like to mention. It seems to me that the stock book maintained by the appellant here is not in strict compliance with Regulation 13(1) of the Control of Supplies Regulations, 1974 and it is to be hoped that immediate steps will be taken by him to rectify this shortcoming.

Order accordingly.

Solicitors: *Chan & Chan.*